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17-26-14

THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 43

Second Programme Item XVIII

CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

PARTIES, COMPLICITY AND LIABILITY FOR THE ACTS OF ANOTHER

30 June 1972

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THE LAW COMMISSION

WORKING PAPER NO. 43

SECOND PROGRAMME, ITEM XVIII

CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

PARTIES, COMPLICITY AND LIABILITY FOR THE ACTS OF ANOTHER

Introduction by the Law Commission

1. The Working Party[1] assisting the Commission in the examination of the general principles of the criminal law has prepared this Working Paper on "Parties, complicity and liability for the acts of another", the second[2] in a series designed as a basis upon which to seek the views of those concerned with the criminal law. In pursuance of its policy of wide consultation, the Law Commission is publishing the Working Paper and inviting comments upon it.

2. As in the case of the first Paper on The Mental Element in Crime, this Paper takes the form of propositions, supported by illustrations and commentary. Although some of the propositions are adapted from sections of the American Law Institute's Model Penal Code, they should not be taken as the words of a draft statute; they must be read together with the illustrations and commentary.

3. The Paper is concerned primarily with parties to offences but it was found that these subjects could not be treated satisfactorily without dealing also with liability for the acts of another and with certain aspects of the criminal

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1. For membership, see p. i.
2. The first, "The Mental Element in Crime" was published as Working Paper No. 31.

liability of corporations.[3] The full range of problems connected with the liability of corporations is set out under Subject 14 of Working Paper No. 17, and these are discussed in Working Paper No.44, which is issued simultaneously with this Paper.

4. The scope of the Paper is limited in that it deals only with parties to offences which have actually been committed, and does not embrace the common law offences of conspiracy, incitement and attempt, all of which may have some bearing upon the law of complicity. The Paper is further limited in that it deals only with the substantive law which will require to be supplemented at the appropriate stage with the procedural provisions to which it refers. The Law Commission, however, agree with the Working Party's view that consultation upon a paper of the present scope should prove more convenient to its recipients than the very lengthy paper which any alternative would necessitate.

5. This Paper is primarily directed towards the eventual codification of the criminal law, and many of the propositions do no more than attempt to state and clarify the present law. However, adoption of the propositions would entail a number of important reforms of the law and, whilst these are indicated or implied in the text of the Paper, we think it would be convenient if we summarise them in our Introduction. In doing this we shall also be able to indicate the particular matters upon which we should welcome the observations of those whom we consult.

Vicarious Liability; criminal responsibility for the acts of another

6. Proposition 4, which elaborates the general principle in proposition 2(2)(b) and deals with responsibility for the

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3. Subjects 13 and 14 of Working Paper No. 17 - "Codification of the Criminal Law - General Principles - The Field of Enquiry".

acts of another, makes an important change in the law. In the law of tort, a master is held liable for all the acts of his servant performed in the course of the servant's employment,[4] but, in the criminal law, a master is generally not so liable.[5] At common law the only offences for which a master could be held criminally liable for his servant's acts were the two offences of strict liability, public nuisance and criminal libel. The courts have, however, interpreted many statutory offences as imposing such liability upon a master.

Techniques for imposing vicarious liability

7. There are two techniques by means of which the legislature can make one person responsible for the act of another. The first is by an explicit provision referring to a person doing something either himself or by his servant or agent. The second is by using a word which the courts interpret as applying to an employer even when it is the employee who physically performs the act. Such words include "sell",[6] "keep",[7] "use"[8] and "possess",[9] each of which has been held in certain contexts to apply both to the person who physically performs the act and to another on whose behalf he does it.

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4. Lloyd v. Grace, Smith & Co. [1912] A.C. 716 (H.L.).

5. Huggins (1730) 2 Stra. 883.

6. Coppen v. Moore (No. 2) [1898] 2 Q.B. 306.

7. Strutt v. Clift [1911] 1 K.B. 1.

8. Green v. Burnett [1955]1 Q.B. 78.

9. Melias Ltd. v. Preston [1957] 2 Q.B. 380, but clearly there are contexts in which possession by one person will not make another responsible; see, for example, s. 8(2) of the Forgery Act 1913 (having custody or possession of a forged die etc.).

8. In the compilation of what Professor Glanville Williams has called a new "judicial dictionary"[10] the courts have applied three different principles. Sometimes they have held a master criminally liable for the acts of his servant by applying the civil law principle that the physical act of the servant is the master's act in law. In Coppen v. Moore (No.2)[11] where the defendant's servant sold the defendant's hams under a false trade description without his knowledge, it was held that "It cannot be doubted that the appellant sold the ham in question although the transaction was carried out by his servant. In other words he was the seller though not the actual salesman".[12] In cases under the Licensing Acts, however, licensees have sometimes been held liable on a different principle. Where a licensee has delegated the control of the licensed premises the acts and mens rea of the delegate have been treated as the licensee's acts and mens rea. In Goodfellow v. Johnson[13] neither of these principles was applicable. A barmaid sold gin to which water had been added. The licensee was prosecuted for an offence under the Food and Drugs Act 1955 which was an offence of strict liability. The barmaid was the servant of the brewery which owned the public house and not of the licensee. Nevertheless, the licensee was held liable because, under the licensing laws, he alone was entitled to sell liquor, and the brewery could not sell liquor in the sense of handling and handing over. The barmaid's acts were held to be not the acts of the brewery but more those of the licensee. Thus a third and comparatively new principle has been introduced: a licensee can be held liable for the acts of others which can only be performed by virtue of the licence, even though they are not his servants. A special proposition[14]

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10. (1956) 9 C.L.P. 68; Criminal Law: The General Part, 2nd ed., 1961, p. 281.

11. [1898] 2 Q.B. 306.

12. Ibid, 313 per Lord Russell C.J.

13. [1965] 1 All E.R. 941; [1965] Crim. L.R. 304 and commentary thereon.

14. Proposition 4(1)(e).

is provided to cover the fact situation which arose in Goodfellow v. Johnson[15].

9. It may be that underlying all these situations there is a principle of general application. A common factor would seem to be that the master[16] is only held liable when, either by selection of his delegate or supervision of his servant, he has some real power of control. Another may be that the master is only made liable when his servant's acts are in furtherance of, and not merely incidental to, the master's trade or business. Proposition 4(1)(a)(ii), however, does not attempt to lay down any guide lines to the courts in their task of interpretation. It provides that a person is responsible for the act of another when the act is described in terms which in the context apply not only to the person who physically performs it but also to him. The proposition does not attempt to identify either the terms or the context. We should be particularly grateful if those whom we consult could give us their observations on this aspect of proposition 4 and we would welcome any suggestions for a more precise formulation of the principles which the courts ought to apply in interpreting this sort of provision.

Vicarious liability for offences with a fault element

10. The effect of vicarious liability is to impose strict liability upon an employer for an offence even at times when the offence in respect of which he is vicariously liable requires a fault element. This result has been achieved by invoking the doctrine of delegation, in particular in the field of licensing law. Where one of the words referred to in paragraph 7 is qualified by the word "knowingly", the courts have held that a master can be held vicariously liable for the acts of his servant in certain circumstances even though he

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15. [1965] 1 All E.R. 941.

16. Or sometimes the licensee where the servant is not employed by him although he exercises the reality of control: see Goodfellow v. Johnson, para. 8 above.

himself did not have the required knowledge, the acts and mens rea of the servant both being imputed to him. If the master has delegated the control of his premises to a servant he will be held liable even when he has an entirely innocent[17] mind but so long as the master remains in control of the premises the knowledge of his servant will not be attributed to him.[18]

11. The anomaly referred to in the previous paragraph was extensively commented upon in the speeches in the House of Lords in Vane v. Yiannopoullos[19]. Lord Reid said[20]-

> There are four cases since 1903 where the word "knowingly" did occur in the relevant section, but they do not support the contention of the appellant in this case. There the courts adopted a construction which on any view I find it hard to justify. They drew a distinction between acts done by a servant, without the knowledge of the licence holder, while the licence holder was on the premises and giving general supervision to his business, and acts done, without the knowledge of the licence holder, but with the knowledge of a person whom the licence holder had left in charge of the premises. In the latter case they held that the knowledge of the person left in charge must be imputed to the licence holder. If that distinction is valid, then I agree with the Divisional Court that on the facts of this case there was not that "delegation" by the accused necessary to make him answerable for the servant having acted against the orders of the accused.
>
> Counsel for the appellant strenuously argued that this distinction is illogical and not warranted by any statutory provision. He maintained that if a licence holder entrusts to his wine waiter the duty of selling intoxicating liquor that is sufficient delegation and that, if the wine waiter disobeys his orders and sells to persons to whom he ought not to sell, there is nothing to justify the licence holder being acquitted if he happens to have been in some other part of the premises but held vicariously liable if he happens to have gone out, leaving the wine waiter in charge.

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17. Allen v. Whitehead [1930] 1 K.B. 211, R. v. Wilson [1968] 1 All E.R. 197.
18. Vane v. Yiannopoullos [1965] A.C. 486 (H.L.).
19. Ibid; and see Howker v. Robinson [1972] Crim. L.R. 377.
20. Ibid, 497.

> If this were a new distinction recently introduced by the courts, I would think it necessary to consider whether a provision that the licence holder shall not knowingly sell can ever make him vicariously liable by reason of the knowledge of some other person. But this distinction has now been recognised and acted on by the courts for over half a century. It may have been unwarranted in the first instance but I would think it now too late to upset so long-standing a practice.
>
> It is, however, quite another matter to extend a long-standing anomaly, particularly because there may in this matter be good practical reasons for requiring a licence holder to be specially careful about the person whom he chooses to leave in charge in his absence.

Comparison with recommendation on the Mental Element in Crime

12. In the Paper on the Mental Element in Crime[21] the Working Party suggested that, for future offences, intention, knowledge or recklessness should be a requirement of liability in every offence of commission unless expressly dispensed with, and that negligence should be a minimum requirement in offences of omission. It would be inconsistent with this approach to provide that an employer could be held vicariously liable for his servant's acts in contravention of a statute requiring a fault element when the employer himself did not have the required fault element. Proposition 4(2) provides, therefore, that, unless otherwise expressly provided, a person shall not be vicariously liable for the act of another where that act is the external element of an offence requiring a fault element unless he himself has the necessary fault element. If adopted, this proposition would, therefore, result in a major reform of the law and would have the effect of overruling such cases as Allen v. Whitehead[22] and of removing the anomaly referred to by Lord Reid.

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21. Working Paper No. 31.
22. [1930] 1 K.B. 211.

The question of complicity by omission to act

13. Proposition 6(4) provides that "a person who is in a position to prevent an offence, because he is in control of property or for some other reason, is not to be taken to be an accessory merely because he fails to prevent an offence". In Du Cros v. Lambourne[23] the appellant appealed to quarter sessions against a conviction for driving a motor car at a dangerous speed. At the hearing of the appeal there was a conflict of evidence as to whether the car was being driven by the defendant or by a lady who was seated by his side in the car; his appeal was dismissed by quarter sessions without deciding whether the appellant was himself driving. Quarter sessions found that if the lady was driving she was doing so with the consent and approval of the defendant, who must have known that the speed was dangerous and who, being in control of the car, could, and ought to have prevented it. The decision was upheld by the Divisional Court. In Tuck v. Robson[24] a licensee, who knew that intoxicating liquor was being consumed after hours and took no steps to enforce his right either to eject the customers or to revoke their licence to be upon the premises, was held to be guilty of aiding and abetting the commission of offences by the customers. In that case the Divisional Court approved a passage from the judgment of Slade J. in National Coal Board v. Gamble[25]- "Mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed: for example, the owner of a car sitting alongside his chauffeur when the latter commits an offence". The proposition would overrule these two decisions and make an important change in the law. It is for consideration whether this change is desirable and we should welcome the views of those whom we consult.

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23. [1907] 1 K.B. 40.
24. [1970] 1 W.L.R. 741.
25. [1959] 1 Q.B. 11, 25.

Complicity by implication

14. Proposition 8 is an adaptation of section 2.06(6)(b) of the American Law Institute's Model Penal Code. Proposition 8 reads -

> A person does not become an accessory to an offence if the offence is so defined that his conduct in it is inevitably incidental to its commission and such conduct is not expressly penalised.

The relevant part of section 2.06 reads -

> Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is a victim of that offense; or
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission; .....

15. The Working Party has omitted from its proposition sub-paragraph (a) of the A.L.I.'s section, on the grounds that a victim's conduct is inevitably incidental to the commission of an offence against him.

The case of Wilcox v. Jeffery[26]

16. It seems clear from the context in which the case of Wilcox v. Jeffery[27] is cited in the Working Paper that the Working Party think that this case ought to be overruled. However, an examination of its facts raises doubts. A famous "professor of the saxophone" was granted permission to land in the United Kingdom on condition that he would not take any employment, paid or unpaid. The defendant, owner and editor of a music magazine, met the musician at the airport and was present when an immigration officer interviewed two other persons who had applied previously for permission for the musician to perform at a concert but had been refused. At

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26. [1951] 1 All E.R. 464.

27. Ibid.

that interview it was stated that the musician would attend at the concert and be "spotlighted" but would not perform. The defendant, knowing of the condition, attended the concert, paid for admission and later published in his magazine a description of the musician's illegal performance with many photographs. He was held guilty of aiding and abetting the musician's contravention of the order. The Divisional Court cited the dictum of Cave J. in R. v. Coney[28]-

> Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence, for the jury.

Devlin J. in his judgment said[29]-

> It may well be that if a spectator goes to a concert he may explain his presence during an illegal item by saying that he hardly felt it necessary to get up and go out and then return when the performance resumed its legality, if I may so call it. It is conceivable that in such circumstances (and I should wish to consider it further if it ever arose) the presence of a person during one item might fall within the accidental or casual class which was envisaged by Cave J. Here there was abundant evidence, apart from the mere fact of the appellant's presence, that he was making use of this item in the performance and that his attendance at that item was, therefore, deliberate. In those circumstances I think the principle in R. v. Coney applies, and that the magistrate was justified in drawing the inference which he did draw.

Obscene Performances

17. In its commentary on proposition 8 the Working Party states that "to apply the law of obscenity against those who knowingly witness an obscene play or knowingly buy an obscene book would greatly extend the law" and, from illustrations (b) and (c),[30] it is clear that it thinks that such an extension

28. (1882) 8 Q.B.D. 534, 540.

29. [1951] 1 All E.R. 464, 467.

30. See p. 67.

would be undesirable. Whether, in the light of the decision in Wilcox v. Jeffery,[31] it would be an extension of the law is debatable, and it is certainly open to argument that the defendant in both examples (b) and (c) ought to be punished. The defendant's guilt in (b) might depend upon whether he knew that the performance was actually illegal but in (c) the defendant both knew of the illegality and used persuasion. This whole subject will fall for further consideration in the Working Party's projected Working Paper on the inchoate offences and particularly the offence of incitement. We should however welcome consultation now on whether the exclusionary effect of proposition 8 may be too wide.

Summary

18. We have indicated the main areas in which law reform as opposed to restatement is implicit in the propositions and it is with reference to those areas that we should particularly welcome consultation. We should also welcome general observations on the objectives and approach of the Paper. All criticisms and comment should be addressed to -

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and it would assist the Commission if they were received by -

31 March 1973.

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31. [1951] 1 All E.R. 464.

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Codification of the Criminal Law

General Principles

Parties, complicity and liability for the acts of another

Introduction

1. This Working Paper puts forward proposals which are principally concerned with the questions raised under Subject 12 of the Law Commission's Working Paper No. 17[1], which relates to complicity. As in the case of the first Working Paper in this series[2], it takes the form of propositions, upon which we week the views of the recipients of the Paper. It is stressed that the propositions are not to be taken as draft sections of a Code and that they should be read with the supporting illustrations and commentary.

2. Although the Paper is concerned primarily with parties to offences and complicity we found that we could not treat these subjects satisfactorily without dealing also with liability for the acts of another and with certain aspects of the liability of corporations.[3] The full range of problems connected with the liability of corporations is set out under Subject 14 of Working Paper No. 17, but for reasons given in paragraph 4 below, consideration of these has been omitted from the present Paper.

3. It is proposed that a person should be responsible for the act of another only when he is expressly made responsible, or when the legislation describes the act in terms which in the context apply to that person, though the physical act may

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1. Working Paper No. 17 - "Codification of the Criminal Law - General Principles - The Field of Enquiry".
2. Working Paper No. 31 - "The Mental Element in Crime".
3. Subjects 13 and 14 of Working Paper No. 17.

be performed by another. The reasoning underlying the second basis of attribution is that there are certain words describing conduct where the act can be regarded as that of the person on whose behalf it is performed. Selling is the prime example. Unless otherwise expressly provided there will be attribution on the second basis referred to only when the act is performed by an employee on his employer's behalf.

4. It is in the field of trading activities that the legislature most frequently sees a need to hold an employer criminally responsible for the acts of his employees, and a large proportion of trading is carried on by corporations. It is, therefore, necessary to deal with the liability of corporations in this connection, since it would not be realistic to expect all legislation which provided that one person should be responsible for the act of another to provide specifically that a corporation should be liable for contravening such legislation. This Paper does not, however, deal with the liability of corporations. It would have been possible to do so to a limited extent in connection with proposition 4, which deals with the attribution of responsibility for the acts of one person to another, but this would have left open to what extent, apart from under the proposition, a corporation should be made liable and whether it can commit offences requiring a mental element. Corporate liability raises a number of problems peculiar to it requiring treatment which goes beyond the confines of a paper on the subject of complicity, and the full range of these problems is, therefore, dealt with in Working Paper No. 44 (Criminal Liability of Corporations) issued simultaneously with the present paper.

5. The scope of the Paper is limited, too, in that it deals only with parties to offences which have actually been committed. By means of the propositions the Paper defines who are principals and who are accessories to such offences, and makes it clear that both are parties to them. Accordingly, it does not embrace the common law offences of conspiracy, incitement and attempt, all of which may have some bearing upon the

law of complicity. In relation to the illustrations in the Paper it is, therefore, necessary to bear in mind that they are to be considered solely in the context of complicity. The fact that in some instances the defendants in these illustrations are, according to the relevant proposition, considered not to be guilty as accessories does not rule out the possibility that in many cases they might be found guilty as principals of an offence of incitement or conspiracy, or of an attempt.

6. Despite the close relationship between complicity and these common law offences, we considered that it would be useful to publish this Paper separately. It is a distinct subject in that it relates only to completed crimes, whereas conspiracy and incitement frequently relate to uncompleted crimes. To combine it with the other subjects would lead to a very wide-ranging and unwieldy paper. It may be, however, that a later study of the common law offences will lead to some modification of the present proposals on omplicity.

7. The propositions deal with the substantive law, but in a Code provisions dealing with procedural matters will also be required. Thus, it will be desirable to restate the present rules respecting the mode of charging, trying, convicting and punishing accessories so that if a defendant is charged either with inciting an offence which is afterwards committed or with helping in it, this will be deemed to be the charge of being an accessory for which he may be convicted notwithstanding that the evidence does not establish the particular form of participation with which he is charged. It may also be desirable to make explicit provision comparable to section 6(3) and 6(4) of the Criminal Law Act 1967, which will have the result of enabling a person charged with being an accessory to an offence to be convicted either of this or of the commission of a substantive offence according to the evidence adduced in support. Conversely, if charged with its commission, he could be convicted either as principal or accessory according to

the evidence.[4] Finally, it may be thought desirable to include procedural provisions enabling a defendant to be convicted on proof that the offence has been committed, even though an accomplice has already been acquitted, provided that the evidence leading to the conviction is not substantially the same as that upon which the accomplice has been acquitted. This will enable a conviction to be obtained if, for example, a defendant has confessed.

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4. See further, commentary to proposition 1.

PARTIES, COMPLICITY AND LIABILITY FOR THE ACTS OF ANOTHER

PROPOSITION 1

WHEN AN OFFENCE IS COMMITTED, BOTH PRINCIPALS AND ACCESSORIES COMMIT THAT OFFENCE.

Commentary.

This proposition restates the present law and (taken in conjunction with the definition of "accessory" in proposition 6) makes it clear that not only the person who commits an offence by his own conduct but also the person who instructs or encourages him to commit it and the person who helps in its commission are guilty of the offence committed. From this it follows that each is liable, unless otherwise specially provided, to the same punishment, disqualification, forfeiture, order for restitution or compensation without express provision to that effect.

The proposition would have the effect on trial procedure of making it unnecessary for a person who incites or helps the commission of an offence to be charged otherwise than as one who has committed the offence, although where the facts are known to the prosecution there may be cases where it will be convenient that particulars should disclose the basis upon which it is alleged that he committed it. There may also have to be procedural provisions to deal, for example, with situations which can arise where a person charged on particulars of helping is shown by the evidence to have incited or to have committed the offence as a principal.

With the abolition of felonies by the Criminal Law Act 1967 section 1, a new terminology is desirable for the parties to an offence. "Principal in the first degree" and "principal in the second degree" are rather cumbrous terms. Furthermore, in relation to crimes actually committed there is no longer

PROPOSITION 1

WHEN AN OFFENCE IS COMMITTED, BOTH PRINCIPALS AND ACCESSORIES COMMIT THAT OFFENCE.

any legal distinction between the person who incites a crime or helps before its commission (the old "accessory before the fact" in felonies) and the person who helps at the time of the crime (the "principal in the second degree"). We have chosen to call both of them "accessories", in contrast to the principal in the first degree whom we call the principal simply. The definitions of "principal" and "accessory" are in propositions 2 to 6. The use of the term "accessory" does not, of course, imply that that party is necessarily less blameworthy than the principal.

Those who are associated as parties to an offence, whether as principals or as accessories, are conveniently called accomplices. This traditional term may well continue to be used if legislation giving effect to these proposals is passed, although it has not been found necessary to use it in the propositions.

The main reasons for distinguishing between principals and accessories, notwithstanding that both are guilty of the same offence, are -

(1) an accessory is not directly indicated as an offender by the law creating the offence, and a special provision is necessary to make him guilty of it;

(2) the mental element necessary to attract liability to the accessory is different from that required in the case of the principal (see proposition 7);

(3) an accessory is not liable if he has withdrawn from participation (see proposition 9).

On these points the propositions declare the present position, but are intended also to clarify and improve it on matters of detail. New proposed rules are introduced on two further

matters -

(1) an accessory is not to be liable if his conduct is inevitably incidental to the offence he has helped to commit and is not expressly penalised (see proposition 8);

(2) an accessory is not to be liable for an indefinite series of offences (see proposition 10).

PROPOSITION 2

(1) A PRINCIPAL IN AN OFFENCE IS ONE WHO, WITH ANY NECESSARY FAULT ELEMENT, DOES THE ACTS CONSTITUTING THE EXTERNAL ELEMENTS OF THE OFFENCE.

(2) A PERSON DOES SUCH AN ACT[5] NOT ONLY WHEN HE DOES IT HIMSELF BUT ALSO WHEN HE -

(a) ACTS THROUGH AN INNOCENT AGENT; OR

(b) IS OTHERWISE RESPONSIBLE FOR THE ACT OF ANOTHER WHICH CONSTITUTES AN EXTERNAL ELEMENT OF AN OFFENCE.

Commentary

This proposition states in broad terms the present law as to who is a principal in an offence. Succeeding propositions 3 and 4 deal in more detail with when a person acts through an innocent agent, and with when a person is responsible for the acts of another.

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5. Here and in succeding propositions we refer to an act, without specific reference to an omission, using that word to include omissions in breach of duty.

In this and in later propositions we use the terms "fault element" and "external elements" in relation to offences in the same sense in which those words were used in Working Paper No. 31. "Fault element" refers to the intention, knowledge, recklessness or negligence required to constitute the offence. In this context "external elements" refer to the constituent elements of an offence other than fault.

PROPOSITION 3

(1) A PERSON ACTS THROUGH AN INNOCENT AGENT WHEN HE INTENTIONALLY CAUSES THE EXTERNAL ELEMENTS OF THE OFFENCE TO BE COMMITTED BY (OR PARTLY BY) A PERSON WHO IS HIMSELF INNOCENT OF THE OFFENCE CHARGED BY REASON OF LACK OF A REQUIRED FAULT ELEMENT, OR LACK OF CAPACITY.

(2) A PERSON IS NOT GUILTY OF COMMITTING AN OFFENCE THROUGH AN INNOCENT AGENT WHEN -

(a) THE LAW PROVIDES OR IMPLIES THAT THE OFFENCE CAN BE COMMITTED ONLY BY ONE WHO COMPLIES WITH A PARTICULAR DESCRIPTION WHICH DOES NOT APPLY TO THAT PERSON, OR SPECIFIES THE OFFENCE IN TERMS IMPLYING PERSONAL CONDUCT ON THE PART OF THE OFFENDER; OR

(b) THE INNOCENT AGENT ACTS WITH THE PURPOSE OF PREVENTING THE COMMISSION OF THE OFFENCE OR OF NULLIFYING ITS EFFECTS.

Illustrations

(a) The defendant committed an offence by instructing a child under 12 or a person of unsound mind, who was not criminally responsible, to do the act. The defendant is the principal in the offence (paragraph (1)).

PROPOSITION 3

(1) A PERSON ACTS THROUGH AN INNOCENT AGENT WHEN HE INTENTIONALLY CAUSES THE EXTERNAL ELEMENTS OF THE OFFENCE TO BE COMMITTED BY (OR PARTLY BY) A PERSON WHO IS HIMSELF INNOCENT OF THE OFFENCE CHARGED BY REASON OF LACK OF A REQUIRED FAULT ELEMENT, OR LACK OF CAPACITY.

(2) A PERSON IS NOT GUILTY OF COMMITTING AN OFFENCE THROUGH AN INNOCENT AGENT WHEN -

(a) THE LAW PROVIDES OR IMPLIES THAT THE OFFENCE CAN BE COMMITTED ONLY BY ONE WHO COMPLIES WITH A PARTICULAR DESCRIPTION WHICH DOES NOT APPLY TO THAT PERSON, OR SPECIFIES THE OFFENCE IN TERMS IMPLYING PERSONAL CONDUCT ON THE PART OF THE OFFENDER; OR

(b) THE INNOCENT AGENT ACTS WITH THE PURPOSE OF PREVENTING THE COMMISSION OF THE OFFENCE OR OF NULLIFYING ITS EFFECTS.

(b) A bank clerk, to cover up a shortage, withheld deposit slips from the bookkeeper and so caused the bookkeeper unwittingly to enter false balances. The clerk is guilty of falsifying the accounts of the bank (Theft Act 1968 section 17) although he himself neither made the false entry nor affirmatively directed its making (paragraph (1)).

(c) A bus conductor gave negligent directions to a bus driver when assisting him to turn the bus. The driver was acquitted of driving without due care and attention. The conductor cannot be convicted of driving the bus through the driver as an innocent agent, not only because that doctrine is inapplicable to offences of negligence but because the notion of driving is not applicable to driving through an agent[6] (paragraph (2)(a)).

(d) The defendant proposed to an employee that they should together burgle the employer's premises, to which the employee had a key. The employee pretended to agree, and obtained his employer's permission to pretend to co-operate with the defendant in order to effect his arrest. The defendant and the employee went to the premises, and the defendant remained outside while the employee entered. If the defendant has not himself committed a trespass he cannot be convicted of burglary as having trespassed through an innocent agent, for

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6. Thornton v. Mitchell [1940] 1 All E.R. 339.

PROPOSITION 3

(1) A PERSON ACTS THROUGH AN INNOCENT AGENT WHEN HE INTENTIONALLY CAUSES THE EXTERNAL ELEMENTS OF THE OFFENCE TO BE COMMITTED BY (OR PARTLY BY) A PERSON WHO IS HIMSELF INNOCENT OF THE OFFENCE CHARGED BY REASON OF LACK OF A REQUIRED FAULT ELEMENT, OR LACK OF CAPACITY.

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(b) THE INNOCENT AGENT ACTS WITH THE PURPOSE OF PREVENTING THE COMMISSION OF THE OFFENCE OR OF NULLIFYING ITS EFFECTS.

either of two sufficient reasons - (1) the employee did not commit the external elements of the offence of burglary (Theft Act 1968 section 9) (paragraph (1)), and (2) the employee acted with the purpose of nullifying the effects of the offence (paragraph (2)(b)).

(e) As in illustration (d), except that the employer was away at the time and the employee obtained the sanction of the police instead of the consent of the employer. Whether or not on these facts the employee committed the external elements of the offence (because he entered the premises at a time at which he was not permitted to enter by the employer), the defendant is not guilty of burglary because he is not regarded as committing the offence if the acts were committed only for the purpose of bringing about his arrest (paragraph (2)(b)).

Commentary

This Proposition is declaratory of the existing law.

Innocent agency is defined in paragraph (1). The word "agent" is customary, although there is no true relationship of principal and agent between the offender and the innocent person he uses to achieve his purpose. But "innocent agent" is a familiar term which can usefully be retained with a simple definition of its meaning such as this paragraph provides.

A principal may act through an innocent agent even though the agent may commit an offence in doing what he is caused to do, provided the agent is innocent in regard to the offence charged against the principal. For example, the agent may kill another in circumstances which amount to no more than manslaughter, the principal having engineered the killing with the intention of killing the victim. The principal commits murder as a principal since the agent was an innocent agent so far as murder was concerned.

Paragraph (1) requires that the innocent agent should commit the external elements of the offence. In illustration (d) the employee does not do this, because one of the external elements of the offence of burglary is trespassory entry, and the employee does not commit a trespass. In illustration (e) it may be doubtful whether the employee commits a technical trespass or not; but it would seem unreal to saddle the defendant with the acts of the innocent agent when the agent acts solely for the sake of frustrating him.[7] The point is therefore covered by the special provision in paragraph (2)(b).

PROPOSITION 4

(1) (a) FOR THE PURPOSE OF PROPOSITION 2(2)(b) A PERSON IS RESPONSIBLE FOR THE ACT OF ANOTHER CONSTITUTING AN EXTERNAL ELEMENT OF AN OFFENCE ONLY -

(i) WHEN HE IS EXPRESSLY MADE SO RESPONSIBLE; OR

(ii) WHEN THE ACT IS DESCRIBED IN TERMS WHICH IN THE CONTEXT APPLY NOT ONLY TO THE PERSON WHO PHYSICALLY PERFORMS IT BUT ALSO TO HIM.

(b) UNLESS OTHERWISE EXPRESSLY PROVIDED, WHEN A PERSON IS MADE RESPONSIBLE FOR THE ACT OF ANOTHER, EITHER IN ACCORDANCE WITH (a)(i) OR (a)(ii) ABOVE, HE IS RESPONSIBLE

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7. See Johnson and Jones (1841) C & M. 218.

ONLY FOR THE ACT OF HIS EMPLOYEE AND ONLY WHEN THAT ACT IS WITHIN THE SCOPE OF THE EMPLOYEE'S EMPLOYMENT.

(c) THE WORD "EMPLOYEE" IN (1)(b) ABOVE MEANS -

(i) A PERSON EMPLOYED UNDER A CONTRACT OF EMPLOYMENT; AND

(ii) A PERSON ACTING, WITH THE CONSENT OF ANOTHER, AS IF HE WERE SO EMPLOYED BY HIM.

(d) UNLESS OTHERWISE EXPRESSLY PROVIDED THE WORD "AGENT" WHEN USED IN ANY LAW TO MAKE ANOTHER RESPONSIBLE FOR THE ACT OF SUCH AGENT MEANS AN EMPLOYEE AS DEFINED IN PARAGRAPH (1)(c) BUT DOES NOT INCLUDE AN INDEPENDENT CONTRACTOR.

(e) WHEN A LAW PROVIDES THAT AN ACTIVITY MAY BE CARRIED ON ONLY BY A LICENSED PERSON, PERSONS EMPLOYED IN THAT ACTIVITY WHO ARE UNDER THE CONTROL OF THE LICENSEE ARE TAKEN TO BE EMPLOYEES OF THE LICENSEE.

Illustrations

(a) A law penalises a licensee who either personally or through his employee serves liquor to a person under age, and the offence is made independent of fault. A 16 year delivery boy, in the temporary absence of his employer, the licensee, serves liquor to a person under age. The licensee is not responsible for the boy's action since, although the boy was an employee, he did not act in the course of any duty which he had authority to perform (paragraph (1)(b)).

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(b) A law penalises a licensee who sells intoxicating liquor to a drunken person, and the offence is made independent of fault. The licensee is liable if he personally sells liquor to such a person and is also liable if the barman he employs does so on his behalf, since the term "sell" applies in the context to the licensee on whose behalf the barman sells,[8] as well as to the barman who physically concludes the sale (paragraph (1)(a)(ii)).

(c) A wife frequently helps her husband in the evening by serving in the bar of the public house of which he is the licensee. If it is an offence for the licensee either personally or through his employee to serve liquor to a person under age, and his wife does this, the licensee is liable, as the wife is acting as if she were employed by the husband[9] (paragraph (1)(c)(ii)).

(d) On an isolated occasion when the licensee is temporarily absent from the bar, a customer, wishing to help the licensee but acting without his knowledge, serves liquor outside permitted hours. The licensee is not liable (paragraph (1)(c)(ii)).

Commentary

There are at present two techniques by which one person is made responsible for the act of another. The first is by an explicit provision making reference to a person doing something either himself or by his servant or agent.[10] The second

8. Police Commissioners v. Cartman [1896] 1 Q.B. 655.

9. Contrast Brandish v. Poole [1968] 1 W.L.R. 544.

10. Present examples of statutory provisions expressly imposing liability on an employer for the act of his employee are illustrated by ss. 59, 155, 157, 163, 165, 166 and 186(2) of the Licensing Act 1964.

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is by using a word which the courts interpret in the light of the relationship between employer and employee as applying to the employer when the employee is the person who physically performs the act. Such words include sell,[11] keep,[12] use[13] and possess,[14] each of which have been held in certain contexts to apply both to the person who physically performs the act and to another on whose behalf he does it; and it is not proposed to require in each case the use of such words as "by himself or by his servant" to indicate that there is responsibility for the act of another. It is necessary to include the phrase "in the context" since the question of responsibility is not to be determined only from the word describing the activity, but from that word considered in the context of the section in which it appears. For example an employee's possession for sale of certain prepacked food which did not meet the requirements of regulatory legislation would be possession by the shopkeeper employer,[15] whereas in other contexts the word "possess"[16] may refer to immediate possession only.

The proposition will result in the exclusion of liability under a doctrine of delegation where the statutory words are not apt to include the employer and where there is no express liability for the act of another. Although a person may be responsible for the act of another this does not necessarily mean that he has committed an offence, for that will depend, as the opening words of proposition 2 make clear, upon whether he has any required fault element. If the offence is an absolute one no further enquiry will be necessary. If it requires

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11. Coppen v. Moore (No. 2) [1898] 2 Q.B. 306.
12. Strutt v. Clift [1911] 1 K.B. 1.
13. Green v. Burnett [1955] 1 Q.B. 78.
14. Melias Ltd. v. Preston [1957] 2 Q.B. 380.
15. See Melias Ltd. v. Preston [1957] 2 Q.B. 380.
16. e.g. in s. 8(1) of the Forgery Act 1913 which penalises having custody or possession of certain forged dies.

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negligence, knowledge or intention the liability of the defendant will depend upon whether he can be shown to have had the necessary fault element.[17]

The principle underlying proposition 4(1) is that whenever responsibility for the act of another is created, whether by an express provision as envisaged in proposition 4(1)(a)(i) or by the use of an appropriate word as envisaged in proposition 4(1)(a)(ii), there will (in the absence of express provision to the contrary) be liability for the act only of an employee as defined, and then only when the act is within the scope of the employee's employment.

The use of the words "employee" or "servant" alone would in one respect operate too restrictively. For example, in Crawford v. Haughton[18] a stock car, which failed to comply with practically every known regulation affecting motor cars, was being driven on a road at the specific request of the owner and with his full knowledge, although the driver was not the employee or servant of the owner. It was held that the owner was not using the car on the road, although the decision would almost certainly have been different if the driver had been the employee of the owner, even if the provision penalised not only using the car but also causing or permitting it to be used (as in the case). This distinction is a very fine one and is not retained in the propositions which provide that a person may be responsible for the acts of one who acts, with that person's knowledge, as if he were his employee. Some mention should perhaps be made of Brandish v. Poole[19]. In that case a law imposed liability on a licensee or his servant who served liquor to a person under age. It was held that the wife of the licensee, selling liquor in his absence,

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17. See proposition 4(2) below.
18. [1972] 1 W.L.R. 572.
19. [1968] 1 W.L.R. 544.

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was not a servant and was, therefore, not guilty of the offence. Whether rightly decided or not, Brandish v. Poole would not, in the light of proposition 4(1)(c) afford support for the argument that a licensee would not be liable under a law penalising a licensee who acts either personally or through his servant, whose wife acted as if she was his servant.

There have been conflicting decisions[20] in cases where responsibility for the acts of another is not expressly created, as to whether that responsibility extends to acts of independent contractors. The proposition makes it clear that there must be express provision to create responsibility for the act of an independent contractor. Where a statute expressly provides liability for the act of another a formula frequently adopted includes the word "agent" to denote the person for whose acts responsibility arises. To ensure that a consistent result is reached in cases of this sort, it is provided expressly that the word "agent" shall not itself include an independent contractor, for in our view it would be wrong for there to be such responsibility without express provision. For example, if a person employs a builder to build a house for him it could not properly be said that such person uses a lorry which he may have lent to the contractor to drive for the purpose of executing the building work.

The proposal to include vicarious liability for independent contractors meets with some difficulty in the case of "labour only" contracts. For example, workmen acting under such a contract may drive the employer's vehicle, which has faulty brakes, and the question may arise whether the employer is using the vehicle through the "labour only" contractors. If the employer is to be regarded as not using the vehicle,

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20. Contrast Quality Dairies (York) Ltd. v. Pedley [1952] 1 K.B. 275 and United Dairies (London) Ltd. v. Beckenham Corporation [1963] 1 Q.B. 434.

then he would not be liable under such regulations as the Motor Vehicles (Construction and Use) Regulations 1969, which impose strict liability on a user; but he would be liable as a n accessory if he knew of the defect, for he would have helped in the commission of the offence by the contractor. If the Regulations were made to conform to the pattern of the Trade Descriptions Act 1968, the contractors might be given a defence of due care and the employer might be made liable as one to whose act or default the contravention was due. On the whole we think it best not to attempt to make a general provision for "labour only" contracts, though the courts may, of course, hold that a particular contract is in fact one of employment and not a genuine engagement of an independent contractor.

(2) WHERE A PERSON IS MADE RESPONSIBLE FOR THE ACT OF ANOTHER, AND THE OFFENCE OF WHICH THAT ACT IS AN EXTERNAL ELEMENT REQUIRES A FAULT ELEMENT FOR ITS COMMISSION, THEN, UNLESS OTHERWISE EXPRESSLY PROVIDED, THE PERSON MADE RESPONSIBLE IS GUILTY OF THE OFFENCE ONLY WHEN HE HAS THE NECESSARY FAULT ELEMENT.

Illustration

A law makes it an offence for a licensee, either himself or through his servant, knowingly to sell liquor to persons to whom he is not permitted to sell it. A barman supplies liquor to such a person whom he knows, but the licensee does not know, to be such. The licensee is not guilty of an offence since, although the barman acted within the scope of his authority, so making the licensee responsible for the sale, the licensee had not the necessary mental element.[21]

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21. It is contemplated that some of the provisions of the Licensing Act 1964 may be reworded so that liability will be imposed upon both the licensee and the immediate actor. In that case the barman in this illustration would be liable.

PROPOSITION 4

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Commentary

In our Paper on the Mental Element in Crime[22] we have suggested that, for future offences, intention, knowledge or recklessness should be a requirement of liability in every offence of commission unless expressly dispensed with, and that negligence should be a requirement in offences of omission. It would be inconsistent with this approach to provide that employers should as a general rule be liable without fault for the conduct of their employees. It is for this reason that we propose that a person should not be liable without fault for the act of another unless liability is expressly stated to be independent of fault on his part.

Accordingly, our proposal will make it impossible for the knowledge or fault of the employee to be equated with the knowledge or fault of the employer, and the distinctions drawn between cases where there has been delegation of management[23] and delegation of some lesser function[24] will disappear.

In practice there will probably be only two types of offences - offences which require no fault element either on the part of the person who physically performs the act or on the part of the person responsible for his act, and offences which require a fault element on the part of each person for their commission. It is theoretically possible for there to be strict liability imposed upon an employer for an offence which requires a fault element on the part of his employee, but it is difficult to envisage circumstances where the legislature would wish so to provide. If it did wish to do

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22. Working Paper No. 31, Introduction.
23. Allen v. Whitehead [1930] 1 K.B. 211.
24. Vane v. Yiannopoullos [1965] A.C. 486.

so, it would have to make specific provision that the employer was liable without fault on his part.

PROPOSITION 5

A PRINCIPAL MAY ACT ALONE OR WITH CO-PRINCIPALS. CO-PRINCIPALS ARE THOSE WHO, WITH ANY NECESSARY FAULT ELEMENT -

(a) JOIN TOGETHER IN DOING THE ACT CONSTITUTING AN ELEMENT OF THE OFFENCE; OR

(b) DO ACTS CONSTITUTING DISTINCT AND COMPLEMENTARY ELEMENTS OF THE OFFENCE; OR

(c) ARE SO ASSOCIATED THAT THE ONE IS LIABLE FOR THE ACT OF THE OTHER WHO HIMSELF COMMITS THE OFFENCE.

Illustrations

(a) A law prohibits exhibition of banners of an offensive character in processions. The two defendants, taking part in a procession, exhibited such a banner, together holding it for display. Each is guilty of the offence as a principal (paragraph (a)).

(b) Two defendants robbed A, the first defendant uttering threats and the second defendant actually taking money from A. Each is a principal in the robbery (paragraph (b)).

(c) A law makes it an offence for a person to do a specified act himself or through his employee. If his employee does the act in the course of his employment, he and the employer are both principals in the offence (paragraph (c)).

Commentary

It is thought that this proposition states the existing law as to who are the main parties to an offence.

PROPOSITION 6

(1) SUBJECT TO PROPOSITION 7 AN ACCESSORY IS ONE WHO INCITES OR HELPS THE COMMISSION OF AN OFFENCE BY A PRINCIPAL.

(2) INCITEMENT INCLUDES ENCOURAGEMENT AND AUTHORISATION.

(3) HELP INCLUDES -

(a) HELP GIVEN OF WHICH THE PRINCIPAL WAS UNAWARE; AND

(b) CONDUCT OF A PERSON WHICH LEADS THE PRINCIPAL TO BELIEVE WHEN COMMITTING THE OFFENCE THAT HE IS BEING HELPED, OR WILL BE HELPED IF NECESSARY, BY THAT PERSON IN ITS COMMISSION.

(4) A PERSON WHO IS IN A POSITION TO PREVENT AN OFFENCE, BECAUSE HE IS IN CONTROL OF PROPERTY OR FOR SOME OTHER REASON, IS NOT TO BE TAKEN TO BE AN ACCESSORY MERELY BECAUSE HE FAILS TO PREVENT AN OFFENCE.

Illustrations

Incitement Cases

(a) A incited B to help C to commit a crime, C subsequently committing it as principal. B is an accessory if he helps C, and in law himself commits the offence. A is an accessory by reason of his incitement of B to help (paragraph (2)).

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(b) The defendant and others agreed that one of their number should break the windows of a neighbour in the hope of driving the neighbour from the district. The plan was carried out. The defendant is guilty as an accessory because he authorised the act to be done on his behalf (paragraph (2)).

(c) A party of youths took it in turn to shoot at a public lamp with their air-guns. Eventually one of them hit the lamp. The others are accessories and guilty of criminal damage, since the conduct of each member of the group amounted to encouragement of the others to commit the offence (paragraph (2)).

Helping Cases

(a) The defendant lent A a knife, knowing[25] that he intended to commit murder with it. The defendant is an accessory to the murder when it is committed (paragraph (2)).

(b) The defendant, seeing A attacking X, pinioned X's arms and held him while A inflicted a serious injury upon him. The defendant was aware[25] that the injury was being inflicted. He is liable as an accessory (paragraph (1)).

(c) The defendant, knowing[25] that A was seeking to murder X, and intending to help him to do so, took steps to prevent X from receiving warning. If A murders X, the defendant

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25. As to the mental element, see proposition 7.

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is an accessory though he had not entered into a conspiracy with A and A was unaware of the help given[26] (paragraph (3)(a)).

(d) The function of the defendant, one of several conspirators, was to stand by with a get-away car in order to help robbers to escape. Helping after the crime is not sufficient to make a person an accessory, but in this instance the defendant in effect gives help during the commission of the offence and so becomes liable (paragraph (3)(b)).

(e) The defendant was look-out man at a robbery. No occasion arose for him to give a warning. He is an accessory and guilty of the robbery (paragraph (3)(b)).

Illustrations of paragraph (4)

(a) The defendant, the owner of a car, allowed a friend to drive it, and while sitting next to him made no attempt to stop the driver from persistently driving at a speed dangerous to the public. The defendant is not an accessory to the offence.[27]

(b) The defendant as supervisor of a learner driver sat beside him in the car giving detailed advice and instruction on what to do in situations as they occurred. When the driver pulled slowly out to overtake a vehicle in a place where it was dangerous to overtake, the defendant, though aware of the danger, took no action to stop the driver overtaking. It is found that

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26. State ex rel. Att.-Gen. v. Tully (1894) 102 Ala. 25, 15 So. 722.

27. Contra, Du Cros v. Lambourne [1907] 1 K.B. 40.

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(a) HELP GIVEN OF WHICH THE PRINCIPAL WAS UNAWARE; AND

(b) CONDUCT OF A PERSON WHICH LEADS THE PRINCIPAL TO BELIEVE WHEN COMMITTING THE OFFENCE THAT HE IS BEING HELPED, OR WILL BE HELPED IF NECESSARY, BY THAT PERSON IN ITS COMMISSION.

(4) A PERSON WHO IS IN A POSITION TO PREVENT AN OFFENCE, BECAUSE HE IS IN CONTROL OF PROPERTY OR FOR SOME OTHER REASON, IS NOT TO BE TAKEN TO BE AN ACCESSORY MERELY BECAUSE HE FAILS TO PREVENT AN OFFENCE.

this encouraged the driver to overtake. The defendant is an accessory to driving without due care and attention.[28]

(c) The licensee of a public house failed to take steps to eject customers who were consuming alcohol on his premises beyond permitted hours. He is not an accessory to their offence.[29]

(d) The defendant and A were fellow employees, the defendant being a storeman in charge of stores. The defendant saw A stealing certain stores but did nothing about it. The defendant is not an accessory to A's offence.

Commentary

Incitement

An important distinction between the present complicity offence where it involves an incitement and incitement as a separate offence is that in the former the substantive offence must have been committed whereas in the latter this is not necessary, although the element of incitement is common to both.

It is, of course, essential that the incitement, encouragement or authorisation should reach the mind of the principal - without this there can be no incitement. But it is not necessary that the incitement should in fact have any effect upon the mind of the principal. On the whole it seems inadvisable to allow a defence of lack of causation, at least where the incitement or encouragement occurs before the criminal conduct commences.

Although there is no direct authority on the question whether the incitement must have a causal relationship to the offence, no one has suggested that such a relationship generally needs to be shown. It does not appear necessary to have any explicity provision that causation is unnecessary.

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28. See Rubie v. Faulkner [1940] 1 K.B. 571 and R. v. Harris [1964] Crim. L.R. 54.

29. Contra, Tuck v. Robson [1970] 1 W.L.R. 741.

Helping Cases

In general any act which helps in the commission of a crime is sufficient under these propositions to constitute the help which makes a person giving it an accessory. The limitation upon liability lies in the mental element required for guilt which is dealt with in proposition 7.

Paragraph 4

This paragraph seeks to ensure that the general principle, that a party does not become a party to a crime by mere omission, is not eroded by application of the law relating to complicity. The wording is designed to ensure that before a person can be found to be an accessory for failing to prevent a crime he must be involved in some way other than by his failure to prevent an offence when he is in a position to do so. It is not possible to spell out what additional factors should be present before a failure to prevent an offence can be sufficient to make a person an accessory to an offence, as these can be many and varied. There may be a case for special provisions in certain contexts to penalise a person in a position of responsibility who permits another to commit an offence, but this ought not to affect the general principle in the present sub-paragraph.

PROPOSITION 7

(1) SUBJECT TO THE FOLLOWING PARAGRAPHS, A PERSON IS ACCESSORY TO AN OFFENCE BY REASON OF CONDUCT DESCRIBED IN PROPOSITION 6 ONLY IF HE -

(a) INTENDS THAT THE OFFENCE BE COMMITTED; OR

(b) KNOWINGLY HELPS THE COMMISSION OF THE OFFENCE WITH KNOWLEDGE OF THE EXTERNAL ELEMENTS OF THE OFFENCE AND OF ANY NECESSARY MENTAL STATE OF THE PRINCIPAL,

AND DOES NOT ACT WITH THE PURPOSE OF PREVENTING THE COMMISSION OF THE OFFENCE OR OF NULLIFYING ITS EFFECTS.

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AND DOES NOT ACT WITH THE PURPOSE OF PREVENTING THE COMMISSION OF THE OFFENCE OR OF NULLIFYING ITS EFFECTS.

Illustrations

(a) The defendant lent a car to A to drive, both the defendant and A knowing the car to be defective and dangerous. If A drives the car the defendant is an accessory to the offence of dangerous driving (paragraph (1)(b)).

(b) The defendant sold a worn-out car to A. He knew that A intended to drive the car, but thought that A would put it in order first. A took the car away on a lorry but later drove it as it was. The defendant is not a party to any offence which A may commit by driving the car. (Paragraph (1)(b) does not apply since the defendant did not know that A intended to commit the offence).

(c) The defendant wrote an article describing ways of making illegal entry into houses. The article was helpful for burglars, and the defendant knew this, but his sole purpose was to write a saleable article for publication. A committed burglary using the information contained in the article. The defendant is not an accessory to the burglary (paragraph (1)(b) and proposition 7A(2) relating to intention in the Working Paper on the Mental Element in Crime).[30]

(d) The defendant, in a newspaper article, declared that all dictators should be killed, and that anyone who did so deserved well of mankind. His intention was only to cause consternation during a forthcoming visit of a foreign dictator,

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30. See Working Paper No. 31. Proposition 7A(2) specifically excludes liability for the wrongdoing of others where this is "foreseen" but not actually intended.

PROPOSITION 7

(1) SUBJECT TO THE FOLLOWING PARAGRAPHS, A PERSON IS ACCESSORY TO AN OFFENCE BY REASON OF CONDUCT DESCRIBED IN PROPOSITION 6 ONLY IF HE -

(a) INTENDS THAT THE OFFENCE BE COMMITTED; OR

(b) KNOWINGLY HELPS THE COMMISSION OF THE OFFENCE WITH KNOWLEDGE OF THE EXTERNAL ELEMENTS OF THE OFFENCE AND OF ANY NECESSARY MENTAL STATE OF THE PRINCIPAL,

AND DOES NOT ACT WITH THE PURPOSE OF PREVENTING THE COMMISSION OF THE OFFENCE OR OF NULLIFYING ITS EFFECTS.

but he was reckless whether the dictator was murdered or not. The dictator was murdered by a person who had read the article. The defendant is not an accessory to the murder. To make him liable in such circumstances it would be necessary to enact a specific offence such as one of recklessly inciting to murder.

(e) The defendant lent A a wrench, suspecting that he might use it for the purpose of burglary, but not being at all sure of this and not caring whether A used it for burglary or not. The defendant is not an accessory to the burglary.

(f) The defendant acting under the orders of the police assisted in a burglary. He thought that the police would be able to arrest his companions and recover the property. In fact the companions escaped with the proceeds. The defendant is not an accessory, because he acted with the purpose of nullifying the effect of the offence even though he failed to do so.

Commentary

This paragraph states the fault element required for liability as an accessory. It does not create liability in itself, but imposes restrictions on the liability created by other sections.

Paragraph (1)(a) applies to liability as an accessory arising from both inciting and helping; but paragraph (1)(b) applies only to cases of helping.

Paragraph (1)(b) requires that the accessory must knowingly help "the commission of the offence". Normally he will help the principal, but in some cases the defendant may

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be uncertain who is to do the act, and know only of the wrongful intention of the person whom he helps, who may himself be cast in a subordinate role. This is sufficient to make the defendant liable. This sub-paragraph also requires that the accessory must have "knowledge of the external elements of the offence". This means that he must know the facts required for commission of the offence but not necessarily, of course, that the law requires them, since it is not intended here to derogate from the general rule as to ignorance of the law.

An offence requiring a mental state cannot be committed by mere recklessness on the part of an accessory. His state of mind must involve the specified element of intention or knowledge. One reason for this restriction is that otherwise there would be a risk of bringing within the penal law persons who have no specifically wrongful intention and who are acting in the ordinary course of business dealings. Recklessness may involve foresight of varying degrees of probability, and a person who refrains from making close enquiry into the intentions of another may take the common attitude that the question is none of his concern. For example, A may sell B an assembly hall suspecting but not knowing for sure that B intends to use it for illegal gaming. Under paragraph (1) he is not a party to an offence that B may afterwards commit. The position is analogous to the rule for handling stolen property, where actual knowledge is required on the part of the receiver. Unless the defendant knows of the wrongful intent of another he is normally free from liability in respect of that wrongdoing. Any cases that are not covered by the law relating to accessories are best dealt with, if at all, under specific provisions, such as those controlling the sale, possession or carrying of an offensive weapon. The effect of this limitation is shown in illustrations (d) and (e). It is not clear whether the existing law is as narrow as stated in the subsection, and it may be thought that the defendant in illustration (d) should be implicated in the offence. But the

justification for taking the narrower view is that the law would be unduly extended if mere words of incitement made a person a party to an offence committed by another which the first did not positively intend. Extreme cases, such as reckless incitement to murder (as in illustration (d)) can if necessary be covered by specific legislation.

The concluding words of the paragraph exclude the police informer who instigates or gives some kind of assistance towards the consummation of the offence, but intends all the time to frustrate it. If his plan miscarries and the offence is committed before the police arrive, he is not an accessory. The reason is that the mental state required for his liability is not merely a mental state in relation to his own immediate action but the mental state of intending the commission of the offence or at least being willing to have it happen. Illustration (f) shows that a person acting under the instructions of the police may safely take part in a burglary if his object is to frustrate the enterprise. In the absence of the consent of the owner he could still technically be charged with complicity in an offence of damage to property, if the burglary involved such damage and if he did not expect the police to intervene until after the damage had been done, because in this case his intention would not fall within the concluding words of the paragraph. Similarly, although such a person would not be guilty of participating in a robbery if he expected the police to arrest the robbers, he would be guilty of participating in an assault forming part of the robbery if he did not expect the police to prevent the assault. It is only in theft and similar offences that the intervention of the police after the event can nullify the effects of the offence. This restates the existing law.

(2) FOR THE PURPOSE OF PARAGRAPH (1) -

(a) INTENTION OR KNOWLEDGE (AS THE CASE MAY BE) MAY RELATE NOT ONLY TO A PARTICULAR OFFENCE BUT TO OFFENCES OF A PARTICULAR KIND, THE ACCESSORY

LEAVING THE DETAILS OF WHAT IS TO BE DONE TO THE PRINCIPAL; AND A PERSON MAY BE AN ACCESSORY TO AN OFFENCE WHICH, ALTHOUGH NOT THE OFFENCE THAT WAS PRIMARILY IN VIEW, WAS ONE THAT HE INTENDED TO BE COMMITTED IN CERTAIN EVENTUALITIES.

(b) THE ACCESSORY IS LIABLE NOTWITHSTANDING THAT THE PRINCIPAL MAKES A MISTAKE AS TO THE IDENTITY OF THE VICTIM OR OF THE PROPERTY AFFECTED BY THE OFFENCE, OR A MISTAKE AS TO THE VICTIM OR PROPERTY INTENDED BY THE ACCESSORY TO BE AFFECTED.

(c) THE ACCESSORY IS LIABLE TO THE SAME EXTENT AS THE PRINCIPAL WHERE THE INTENDED OFFENCE TAKES EFFECT ON AN UNINTENDED VICTIM OR PROPERTY, UNLESS THE PRINCIPAL CONSCIOUSLY ALLOWS THE PLAN TO MISCARRY.

Illustrations

(a) The defendant lent A oxy-acetylene apparatus, knowing that A intended to use it for breaking into premises or for breaking into stolen safes or for some other dishonest purpose. The defendant is an accessory to any such offence of dishonesty for which A uses the apparatus (paragraph (2)(a)). (See, however, the limitation in proposition 10, p. 32).

(b) As in illustration (a) but the defendant positively thought that A intended to use the apparatus himself, whereas in fact A passed it on for use by his accomplice B. The defendant is guilty as an accessory, his mistake being immaterial to his liability under paragraph (2)(a).

PROPOSITION 7

(2) FOR THE PURPOSE OF PARAGRAPH (1) -

(a) INTENTION OR KNOWLEDGE (AS THE CASE MAY BE) MAY RELATE NOT ONLY TO A PARTICULAR OFFENCE BUT TO OFFENCES OF A PARTICULAR KIND, THE ACCESSORY LEAVING THE DETAILS OF WHAT IS TO BE DONE TO THE PRINCIPAL; AND A PERSON MAY BE AN ACCESSORY TO AN OFFENCE WHICH, ALTHOUGH NOT THE OFFENCE THAT WAS PRIMARILY IN VIEW, WAS ONE THAT HE INTENDED TO BE COMMITTED IN CERTAIN EVENTUALITIES.

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(c) THE ACCESSORY IS LIABLE TO THE SAME EXTENT AS THE PRINCIPAL WHERE THE INTENDED OFFENCE TAKES EFFECT ON AN UNINTENDED VICTIM OR PROPERTY, UNLESS THE PRINCIPAL CONSCIOUSLY ALLOWS THE PLAN TO MISCARRY.

(c) The defendant lent A oxy-acetylene apparatus, believing that he intended to use it for breaking into premises of unknown location to commit theft of unknown property. In fact A used it for breaking into premises to murder the occupant. The defendant is an accessory to burglary, his mistake as to A's precise intent being immaterial for this purpose (paragraph (2)(a) and the Theft \ct 1968 section 9(2)), but he is not an accessory to murder.

(d) The defendant and others conspired to rob a bank. When they went to the bank the defendant himself carried no weapon, but he knew that his companion had a gun with live ammunition. In the course of the robbery the companion used his gun to kill a bank clerk who offered resistance. The defendant intended his companion to use the gun to kill anyone who offered resistance. He will be rightly convicted of being an accessory to murder (paragraph (2)(a)).

(e) As in illustration (d), but the defendant knew that although his companion habitually carried a gun for self-defence in gang warfare, he had never used it in committing offences, and believed that the gun would not be used for the robbery. He is not an accessory to the murder.

(f) The defendant hired an assassin to kill a named person. The assassin killed another person (i) mistakenly thinking that he was the named person or (ii) having misheard his instructions. The defendant is an accessory to murder in either event (paragraph (2)(b)). If, owing to a misunderstanding of his instructions, however reasonable, the principal committed a different kind of offence, e.g. robbery, the defendant would not be an accessory to this.

PROPOSITION 7

(2) FOR THE PURPOSE OF PARAGRAPH (1) -

(a) INTENTION OR KNOWLEDGE (AS THE CASE MAY BE) MAY RELATE NOT ONLY TO A PARTICULAR OFFENCE BUT TO OFFENCES OF A PARTICULAR KIND, THE ACCESSORY LEAVING THE DETAILS OF WHAT IS TO BE DONE TO THE PRINCIPAL; AND A PERSON MAY BE AN ACCESSORY TO AN OFFENCE WHICH, ALTHOUGH NOT THE OFFENCE THAT WAS PRIMARILY IN VIEW, WAS ONE THAT HE INTENDED TO BE COMMITTED IN CERTAIN EVENTUALITIES.

(b) THE ACCESSORY IS LIABLE NOTWITHSTANDING THAT THE PRINCIPAL MAKES A MISTAKE AS TO THE IDENTITY OF THE VICTIM OR OF THE PROPERTY AFFECTED BY THE OFFENCE, OR A MISTAKE AS TO THE VICTIM OR PROPERTY INTENDED BY THE ACCESSORY TO BE AFFECTED.

(c) THE ACCESSORY IS LIABLE TO THE SAME EXTENT AS THE PRINCIPAL WHERE THE INTENDED OFFENCE TAKES EFFECT ON AN UNINTENDED VICTIM OR PROPERTY, UNLESS THE PRINCIPAL CONSCIOUSLY ALLOWS THE PLAN TO MISCARRY.

(g) A, wishing to kill his wife, consulted the defendant, who advised him to give her a poisoned apple. This A did, but his wife immediately passed the apple to his child. A did not wish to reveal his wicked intention, and watched the child eat the apple and die. The defendant is not an accessory to the murder, since A consciously allowed the plan to miscarry[31] (paragraph (2)(c)).

Commentary

The rule in paragraph (2)(a) that the defendant need only intend the kind of offence, or know the kind of offence that is intended by his accomplice, when he leaves the details to those accomplices, is supported by cases such as Bainbridge.[32]

The second limb of paragraph (2)(a) concerns incidental offences. This is intended to state the rule derived from the cases on the unintended use of weapons (illustration (d)).

Paragraph (2)(b) applies to accessories the usual rules as to mistake of victim or property, and it establishes a similar rule for a misunderstanding by the principal of his instructions. There seems to be no authority at present on the latter point.

Paragraph (2)(c) applies the law of transferred intention and reaffirms the decision in Saunders and Archer.[31]

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31. Saunders and Archer (1575) 2 Plowden 473. This may seem to be a startling result, but the situation is really no different from that in which the principal deliberately changes his plan and commits an offence which the accessory never intended to be committed. The defendant in the illustration will, of course, be an accessory to the attempted murder of A's wife.

32. [1960] 1 Q.B. 129.

(3) WHERE AN OFFENCE IS COMMITTED RECKLESSLY IT IS SUFFICIENT FOR THE LIABILITY OF AN ACCESSORY THAT HE KNOWS OF THE RECKLESSNESS OF THE PERSON WHOM HE INCITES OR HELPS.

Illustration

A committed deception by recklessness and the defendant, having the same knowledge as A, helped him by preparing the false statements which A used. The defendant is an accessory to A's offence.

Commentary

It was pointed out in the commentary on paragraph (that recklessness is not generally sufficient to make a person an accessory. However, the present subsection introduces liability where the principal is reckless and the defendant incites or helps him knowing his state of mind. Here the accessory has full knowledge of all the elements of the offence that are known to the principal and also knows the principal's state of mind. To deny liability in this case would probably be regarded as too narrow a view of the law.

(4) A PERSON MAY BE AN ACCESSORY TO AN OFFENCE OF NEGLIGENCE OR OF STRICT LIABILITY ONLY WHEN HE KNOWS OF THE EXTERNAL ELEMENTS OF THE OFFENCE, BUT MAY BE AN ACCESSORY TO MANSLAUGHTER IF HE HAS THE FAULT ELEMENT APPROPRIATE TO THAT OFFENCE.

Illustrations

(a) Three persons engaged in target practice in a field, negligently failing to take proper precautions to prevent injury to others living in the vicinity. A shot fired by one of the party (it is not known which) killed a person in his garden nearby. All three are guilty of negligent homicide (manslaughter).

PROPOSITION 7

(4) A PERSON MAY BE AN ACCESSORY TO AN OFFENCE OF NEGLIGENCE OR OF STRICT LIABILITY ONLY WHEN HE KNOWS OF THE EXTERNAL ELEMENTS OF THE OFFENCE, BUT MAY BE AN ACCESSORY TO MANSLAUGHTER IF HE HAS THE FAULT ELEMENT APPROPRIATE TO THAT OFFENCE.

(b) Two persons agreed expressly or by mutual understanding to race their cars on the highway. Both drove with gross negligence, and A, a pedestrian, was killed by one of them (it is not known which). Both are guilty of negligent homicide (manslaughter). The participants in a race contemplate that each competitor will proceed as fast as he can, and agreeing to race amounts to encouragement of this conduct, which in the circumstances was negligent.[33]

(c) A, driving a car, passed B. B, angered by this, accelerated to pass A, and thus a kind of competition developed between the two drivers, and each drove at a negligent speed. A pedestrian was killing by one of the drivers, it is not known which. Only the driver who killed the pedestrian is guilty of negligent killing, and since his identity cannot be established neither driver can be convicted of manslaughter. Neither party intended the other to drive fast. Knowingly causing another person to do an act is not sufficient to constitute incitement to do it.[34]

Commentary

Paragraph (1), which states the mental element for complicity is expressed to be subject to the later paragraph. The present paragraph, therefore, establishes an exception to the principle of paragraph (1). In the case of offences of negligence or strict liability the courts have followed apparently inconsistent lines of reasoning. On the one hand a line of cases

33. See Swindall (1846) 2 C & K. 230.
34. See Mastin (1834) 6 C & P. 396.

PROPOSITION 7

(4) A PERSON MAY BE AN ACCESSORY TO AN OFFENCE OF NEGLIGENCE OR OF STRICT LIABILITY ONLY WHEN HE KNOWS OF THE EXTERNAL ELEMENTS OF THE OFFENCE, BUT MAY BE AN ACCESSORY TO MANSLAUGHTER IF HE HAS THE FAULT ELEMENT APPROPRIATE TO THAT OFFENCE.

establishes that an accessory must know all the facts, even in offences of strict liability.[35] On the other hand, it is well recognised that manslaughter can be committed by several persons who commit a common act of negligence, as in illustrations (a) and (b), even though only one of them is the principal. It is clear, therefore, that in manslaughter the accessory need not know all the facts, e.g. the presence of the pedestrian who is injured. Perhaps the distinction is between manslaughter, which requires negligence, and offences of strict liability, which do not. But if an offence of negligence does not require knowledge, it would seem to follow a fortiori that an offence of strict liability should not. A practical distinction between the two lines of authority is that in the manslaughter cases all those concerned commit identical acts of negligence at substantially the same time and in each other's presence, while in the strict liability cases the alleged accessory is in a more remote relationship to the principal, for example where a veterinary surgeon who negligently certifies meat as fit for sale when it is not is accessory to a butcher charged with selling food unfit for human consumption. Even this distinction is not convincing, because the veterinary surgeon in the case put is morally the responsible party, not the butcher who sells in reliance on the professional certificate. There is no obvious reason why a stricter criterion should be applied to the butcher than to him.

Perhaps the best reason for the distinction is that manslaughter is a crime with serious consequences, being established for the preservation of life, and it is for this reason made an exception to the general rule. The same reasoning would apply to the crime of causing death by dangerous driving, if that crime continues to exist. The paragraph assumes that manslaughter by negligence continues to form part of the law. Further consideration of the law relating to offences against the person may perhaps result in a change of the law in regard to this offence. It may then be possible to

35. Ferguson v. Weaving [1951] 1 K.B. 814; Gardner v. Akeroyd [1952] 2 Q.B. 743.

do without the present qualification to the general rule.

Subject to the above the paragraph continues the common law rule for accessories to offences of negligence and of strict liability, namely the rule requiring the accessory to have known the facts. Where a crime of negligence can be committed by specified negligent conduct without requiring a harmful result, a person can be an accessory to the crime under the paragraph if he knows all the facts necessary to constitute negligence in the principal. Such knowledge will almost inevitably infect him with the negligence.

(5) A PERSON IS AN ACCESSORY TO AN OFFENCE OF ATTEMPT OR INCITEMENT ONLY IF HE HAS THE MENTAL STATE REQUIRED FOR THE OFFENCE THAT IS ULTIMATELY IN VIEW.

Illustration

A wished to murder B by poisoning and asked the defendant to help him. The defendant, in order to frustrate the offence, gave A a harmless powder which A put into B's coffee believing it to be a deadly poison. A is guilty of attempted murder, but the defendant is not an accessory to the attempt.

PROPOSITION 8

A PERSON DOES NOT BECOME AN ACCESSORY TO AN OFFENCE IF THE OFFENCE IS SO DEFINED THAT HIS CONDUCT IN IT IS INEVITABLY INCIDENTAL TO ITS COMMISSION AND SUCH CONDUCT IS NOT EXPRESSLY PENALISED.

Illustrations

(a) A law makes it an offence to have sexual intercourse with a girl under sixteen, and her consent is no defence (Sexual Offences Act 1956 sections 5 and 6). The defendant had sexual intercourse with a girl under sixteen at her

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instigation. The girl is not an accessory to the offence.[36]

(b) A law make it an offence to give an obscene performance. Spectators at the performance who have paid for admission are not accessories to the offence.

(c) A law makes it an offence to sell certain goods without a licence, but not to buy from a person who has no licence. The defendant bought such goods knowing of the law and knowing that the seller had no licence; he also used persuasion on the seller to induce him to sell. The defendant is not a party to the offence.

Commentary

English law at present applies this rule only where the other party is a victim of the offence, the law having been passed for his or her protection, as in illustration (a). Although this application of the rule has never been questioned, one of the few instances of it in the Law Reports is that in illustration (a). Others can be imagined. For example, it is an offence to keep an old persons' home without a licence; this law is evidently established for the protection of old persons, and an old person who knowingly resides in an unlicensed home would not be an accessory to the offence of keeping the home.

The present law relating to being an accessory to obscene performances (illustration (b)) is not clear. In Wilcox v. Jeffery[37] it was held that a person who paid for admission to an illegal performance (illegal because in breach of an alien's condition of entry to the United Kingdom) was guilty of abetting it, the payment being (in the circumstances) an encouragement.

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36. Tyrrell [1894] 1 Q.B. 710.

37. [1951] 1 All E.R. 464. [See Law Commission Introduction, pp. (9)-(11) above].

There seems to be no instance of the spectators of an obscene performance being prosecuted on this ground, and it might be argued that they could not be convicted of abetting because the law of obscenity is intended for their protection. No doubt the law of obscenity has additional objects in view (the protection of public morals), but so has the law against sexual intercourse with girls under sixteen, and here it is clear that the girl who is the person immediately "corrupted" does not abet the offence. To apply the law of obscenity against those who knowingly witness an obscene play or knowingly buy an obscene book would greatly extend the law. The proposition is adapted from section 2.06 (6)(b) of the American Law Institute's Model Penal Code. The justification for the rule is that a criminal offence should not be created by implication.

If it is accepted that a law aimed against sellers should not apply to buyers, in the absence of express words, it must follow that the buyer is free from liability even though he took the initiative in asking the seller to sell. For it would be absurd if the buyer's liability depended on the question who initiated the transaction. Although the rule seems on the whole to be justifiable, it creates certain difficulties. It may seem somewhat anomalous to exempt the buyer from liability in the case put, when other persons who encourage the transaction (not being parties to it) are guilty as accessories. However, it is unlikely that other persons would in practice incite the seller unless they had some indirect interest in his committing the offence.

PROPOSITION 9

A PERSON WHO HAS INCITED OR GIVEN HELP TOWARDS THE COMMISSION OF AN OFFENCE IS NOT GUILTY AS AN ACCESSORY IF HE GENUINELY WITHDRAWS FROM PARTICIPATION IN TIME TO MAKE IT POSSIBLE FOR THE OFFENCE NOT TO BE COMMITTED, AND EITHER -

(a) COMMUNICATES HIS WITHDRAWAL TO THE PRINCIPAL, OR TO ONE OF THEM IF THERE ARE MORE THAN ONE; OR

PROPOSITION 9

A PERSON WHO HAS INCITED OR GIVEN HELP TOWARDS THE COMMISSION OF AN OFFENCE IS NOT GUILTY AS AN ACCESSORY IF HE GENUINELY WITHDRAWS FROM PARTICIPATION IN TIME TO MAKE IT POSSIBLE FOR THE OFFENCE NOT TO BE COMMITTED, AND EITHER -

(a) COMMUNICATES HIS WITHDRAWAL TO THE PRINCIPAL, OR TO ONE OF THEM IF THERE ARE MORE THAN ONE; OR

(b) TAKES REASONABLE STEPS IN AN ENDEAVOUR TO PREVENT THE OFFENCE BEING COMMITTED.

(b) TAKES REASONABLE STEPS IN AN ENDEAVOUR TO PREVENT THE OFFENCE BEING COMMITTED.

Illustrations

The defendant, in pursuance of an agreement with two accomplices that a certain warehouse should be broken into and goods stolen from it, procured a plan of the premises which he gave to his accomplices. The defendant then decided not to participate any further, and to have nothing to do with the offence or its proceeds. Thereafter -

(a) He informed one or both of the accomplices, who nevertheless proceeded with the offence. The defendant is not an accessory to the offence.

(b) The day before the offence, by anonymous telephone call, he informed the owner of the warehouse of the proposed offence. He is not an accessory.

(c) He neither told the accomplices nor gave any warning of the proposed offence. He is an accessory to the offence.

Commentary

It seems that at present an accomplice can withdraw from a plot by giving clear notice to his companions,[38] and this rule is here perpetuated, with slight modification.

The authorities do not explicitly consider whether an accomplice may withdraw not merely after using words of incitement but after providing positive assistance towards carrying out a crime. Nor is there authority for the part of the rule stated in paragraph (b). But it seems logical to regard the genuine termination of participation as the vital factor and the manifestation of this rather as evidential. The view taken here is that the law should give a reasonable encouragement to

38. Croft [1944] K.B. 295; Fletcher [1962] Crim. L.R. 551.

an accomplice to withdraw, provided he does so genuinely. It seems, however, that there should be some ready rule of thumb by which the genuiness of a withdrawal may be tested. The policy behind the two tests advanced is that the person withdrawing must do something to prevent the commission of the offence. He may either inform the principal in the offence of the end of his participation, since this may inhibit the principal from continuing, or he may take reasonable steps in due time in an effort to prevent the offence.

\lthough a defendant can take advantage of these provisions, this does not necessarily mean that he will escape all criminal liability for what he has done. His responsibility will, however, be changed from that of a party to the offence to that of one guilty of incitement or conspiracy. At present he cannot be convicted of either of these latter two offences unless so charged; it will be for consideration in our examination of inchoate crimes whether there should be a procedural provision to allow conviction for incitement or conspiracy on a charge of committing the main offence, where the accused establishes the defence of withdrawal.

PROPOSITION 10

> WHERE A PRINCIPAL IS HELPED IN THE COMMISSION OF MORE THAN ONE OFFENCE BY A SINGLE ACT OF HELP, THE ACCESSORY WHO \FFORDED THAT HELP SHALL NOT, AFTER HAVING BEEN CONVICTED OF ONE OR MORE OF SUCH OFFENCES, BE CONVICTED OF ANOTHER OF SUCH OFFENCES OF EQUAL OR LESSER GRAVITY.

Illustration

> The defendant lent A a car, knowing that A intended to commit one or more burglaries with its aid. A committed two burglaries. The defendant may be convicted of both these crimes, but he cannot be convicted of the one offence on one occasion and of the other on a later occasion. It makes no difference whether or not the order of the charges against the defendant is the same as the order in which

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the crimes were committed.[39]

Commentary

This proposition remedies a situation which might theoretically arise under the existing law. It seems wrong that a person should be subject to an indefinite series of convictions where he has lent something that can be used for a series of offences, and particularly so if he has merely given information of use for the commission of crime, for whereas he may sometimes be able to get a material object back he can hardly ever undo the effect of information once communicated.

The problem arises because of the theory that an accessory is implicated in each separate crime that he incites or helps. This theory perhaps creates no injustice where there is incitement, since the inciter can at any time escape liability for the future by using words nullifying the effect of his incitement (proposition 9). But cancellation is hardly possible where a person becomes a party by an act of assistance which in its nature is capable of contributing to a number of offences, as where he instructs a poisoner in the fatal dose of a poison, or sells a burglar a housebreaking tool. In these cases it is just to regard the accessory as having in effect committed only one wrongful act, and not to use against him the fiction of a multiplicity of acts. He is, therefore, given a special defence of autrefois convict.

The proposition allows the accessory to be convicted of several of the crimes on a single occasion. It is often wise to procure the conviction of a defendant on two charges and to sentence concurrently for both, because of the risk that one of

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39. The danger of the prosecution making inequitable use of this proposition deliberately to secure subsequent convictions for offences of greater gravity though they knew of the offences when first indicting for the lesser offences would be met by the attitude of the courts.

PROPOSITION 10

WHERE A PRINCIPAL IS HELPED IN THE COMMISSION OF MORE THAN ONE OFFENCE BY A SINGLE ACT OF HELP, THE ACCESSORY WHO AFFORDED THAT HELP SHALL NOT, AFTER HAVING BEEN CONVICTED OF ONE OR MORE OF SUCH OFFENCES, BE CONVICTED OF ANOTHER OF SUCH OFFENCES OF EQUAL OR LESSER GRAVITY.

the convictions will be reversed on appeal. But it is to be assumed that the punishment in such a case will be based upon a consideration of the part that the defendant has played in the crimes, and he may not subsequently be punished for another similar crime committed with the information or the instrumentality that he has supplied.